



1 Plaintiff Shiva Stein (“Plaintiff”), by her attorneys, makes the following allegations  
2 against Intermolecular, Inc. (“Intermolecular” or the “Company”) and the members of the board  
3 of directors of Intermolecular (the “Board” or “Individual Defendants,” along with  
4 Intermolecular, collectively referred to as the “Defendants”), for their violations of Sections 14(a)  
5 and 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. §§ 78n(a),  
6 78t(a), SEC Rule 14a-9, 17 C.F.R. 240.14a-9, and Regulation G, 17 C.F.R. § 244.100 in  
7 connection with the proposed merger (the “Proposed Transaction”) between Intermolecular and  
8 affiliates of Merck KGaA, Darmstadt, Germany (“Merck”). The allegations in this complaint are  
9 based on the personal knowledge of Plaintiff as to herself and on information and belief  
10 (including the investigation of counsel and review of publicly available information) as to all  
11 other matters stated herein.

## 12 **INTRODUCTION**

13 1. This is an action brought by Plaintiff to enjoin the Proposed Transaction whereby  
14 EMD Group Holding II, Inc., a wholly owned subsidiary of Merck (“Merger Sub”) will merge  
15 with and into Intermolecular, with Intermolecular continuing as the surviving corporation in the  
16 Proposed Transaction and a wholly owned subsidiary of Merck, for \$1.20 in cash for each  
17 Intermolecular share owned (the “Merger Consideration”). The Board has unanimously  
18 recommended to the Company’s stockholders that they vote for the Proposed Transaction.

19 2. To convince Intermolecular stockholders to vote in favor of the Proposed  
20 Transaction, on May 28, 2019, the Board authorized the filing of a materially incomplete and  
21 misleading Preliminary Proxy Statement on Schedule 14A (the “Proxy”) with the Securities and  
22 Exchange Commission (“SEC”). The Proxy violates Sections 14(a) and 20(a) of the Exchange  
23 Act by noncompliance with Regulation G and SEC Rule 14a-9 (17 C.F.R. § 244.100 and 17  
24 C.F.R. § 240.14a-9, respectively).

25 3. Defendants have failed to disclose certain material information necessary for  
26 Intermolecular stockholders to properly assess the fairness of the Proposed Transaction, thereby  
27 violating SEC rules and regulations and rendering certain statements in the Proxy materially  
28 incomplete and misleading.





## SUBSTANTIVE ALLEGATIONS

### *The Proposed Transaction*

22. On May 6, 2019, Intermolecular and Merck jointly announced that it had entered into the Agreement and Plan of Merger (the “Merger Agreement”):

SAN JOSE, Calif., May 6, 2019 /PRNewswire/ --Intermolecular, Inc. (NASDAQ: IMI) has signed a definitive agreement pursuant to which a wholly owned subsidiary of Merck KGaA, Darmstadt, Germany, a leading science and technology company, will acquire Intermolecular for \$1.20 per share in an all cash transaction, representing an equity value of Intermolecular of approximately \$62 million. The acquisition has been unanimously approved by Intermolecular's Board of Directors and the Executive Board of Merck KGaA, Darmstadt, Germany.

“We are pleased to become an integral part of Merck KGaA, Darmstadt, Germany's leading electronic materials business and look forward to all of the new and exciting opportunities we see for our customers and employees. We believe our technology expertise is very complementary and creates a unique offering that will continue to shape the innovations of tomorrow,” said Chris Kramer, President and Chief Executive Officer of Intermolecular.

“Intermolecular's unique capabilities in rapid material screening, in combination with the R&D pipeline of Merck KGaA, Darmstadt, Germany, will allow us to offer our customers faster materials innovation, through parallel composition experiment and full performance testing and characterization,” said Kai Beckmann, member of the Merck KGaA, Darmstadt, Germany, Executive Board and CEO of Performance Materials. “We are excited to join forces with Intermolecular and bring significant advantages to our customers compared to conventional materials R&D.”

The transaction is expected to close in the second half of 2019, subject to the approval of Intermolecular's stockholders, clearance by the Committee on Foreign Investment in the United States (CFIUS) and the satisfaction of other customary closing conditions.

Merck KGaA, Darmstadt, Germany, will acquire Intermolecular through its wholly owned subsidiary EMD Group Holding II, Inc.

As a result of this transaction, Intermolecular will not be holding its previously scheduled conference call on May 14, 2019.

## **Advisors**

Cowen served as exclusive financial advisor to Intermolecular and Latham & Watkins LLP served as Intermolecular's legal advisor. Nixon Peabody LLP served as Merck KGaA, Darmstadt, Germany's legal advisor.

### ***The Materially Misleading and Incomplete Solicitation Statement***

23. On May 28, 2019, Defendants caused the Proxy to be filed with the SEC in connection with the Proposed Transaction. The Proxy solicits the Company's shareholders to vote in favor of the Proposed Transaction. Defendants were obligated to carefully review the Proxy before it was filed with the SEC and disseminated to the Company's shareholders to ensure that it did not contain any material misrepresentations or omissions. However, the Proxy misrepresents and/or omits material information that is necessary for the Company's shareholders to make an informed decision concerning whether to vote in favor of the Proposed Transaction, in violation of Sections 14(a) and 20(a) of the Exchange Act.

### ***Financial Forecasts***

24. The Proxy fails to provide material information concerning the Company's financial forecasts, which were developed by the Company's management and relied upon by the Board in recommending that the shareholders vote in favor of the Proposed Transaction. Proxy at 47-48. These financial forecasts were also relied upon by the Company's financial advisor, Cowen, in rendering its fairness opinions.

25. With respect to the Projections, the Proxy discloses the values and definitions of certain financial metrics, including Adjusted EBITDA for forecasting, budgeting, and measuring operating performance, but fails to provide: (i) the value of certain line items used to calculate these non-GAAP measures, or (ii) a reconciliation to their most comparable GAAP measures, in direct violation of Regulation G and consequently Section 14(a).

26. The SEC has indicated that if the most directly comparable GAAP measure is not accessible on a forward-looking basis, the company must disclose that fact, provide any reconciling information that is available without unreasonable effort, identify any unavailable

1 information and disclose the probable significance of that information. A company is permitted to  
2 provide the projected non-GAAP measure, omit the quantitative reconciliation and qualitatively  
3 explain the types of gains, losses, revenues or expenses that would need to be added to or  
4 subtracted from the non-GAAP measure to arrive at the most directly comparable GAAP  
5 measure, without attempting to quantify all those items.

6 27. When a company discloses non-GAAP financial measures in a registration  
7 statement that were relied on by a board of directors to recommend that shareholders exercise  
8 their corporate suffrage rights in a particular manner, the company must, pursuant to SEC  
9 regulatory mandates, also disclose all forecasts and information necessary to make the non-GAAP  
10 measures not misleading, and must provide a reconciliation (by schedule or other clearly  
11 understandable method) of the differences between the non-GAAP financial measure disclosed or  
12 released with the most comparable financial measure or measures calculated and presented in  
13 accordance with GAAP. 17 C.F.R. § 244.100.

14 28. Indeed, the SEC has increased its scrutiny of the use of non-GAAP financial  
15 measures in communications with shareholders. Former SEC Chairwoman Mary Jo White has  
16 stated that the frequent use by publicly traded companies of unique company-specific, non-GAAP  
17 financial measures (as Intermolecular included in the Proxy here), implicates the centerpiece of  
18 the SEC's disclosures regime:

19 In too many cases, the non-GAAP information, which is meant to supplement the  
20 GAAP information, has become the key message to investors, crowding out and  
21 effectively supplanting the GAAP presentation. Jim Schnurr, our Chief  
22 Accountant, Mark Kronforst, our Chief Accountant in the Division of Corporation  
23 Finance and I, along with other members of the staff, have spoken out frequently  
24 about our concerns to raise the awareness of boards, management and investors.  
25 And last month, the staff issued guidance addressing a number of troublesome  
26 practices *which can make non-GAAP disclosures misleading*: the lack of equal or  
27 greater prominence for GAAP measures; exclusion of normal, recurring cash  
28 operating expenses; individually tailored non-GAAP revenues; lack of consistency;  
cherrypicking; and the use of cash per share data. I strongly urge companies to  
carefully consider this guidance and revisit their approach to non-GAAP  
disclosures. I also urge again, as I did last December, that appropriate controls be



1 considered and that audit committees carefully oversee their company's use of non-  
2 GAAP measures and disclosures.<sup>1</sup>

3 29. The SEC has repeatedly emphasized that disclosure of non-GAAP forecasts can  
4 be inherently misleading and has therefore heightened its scrutiny of the use of such forecasts.<sup>2</sup>  
5 Indeed, the SEC's Division of Corporation Finance released a new and updated Compliance and  
6 Disclosure Interpretation ("C&DI") on the use of non-GAAP financial measures to clarify the  
7 extremely narrow and limited circumstances, known as the business combination exemption,  
8 where Regulation G would not apply.<sup>3</sup>

9 30. More importantly, the C&DI clarifies when the business combination exemption  
10 does not apply:

11 There is an exemption from Regulation G and Item 10(e) of Regulation S-K for  
12 non-GAAP financial measures disclosed in communications subject to Securities  
13 Act Rule 425 and Exchange Act Rules 14a-12 and 14d-2(b)(2); it is also intended  
14 to apply to communications subject to Exchange Act Rule 14d-9(a)(2). This  
15 exemption does not extend beyond such communications. Consequently, if the  
16 same non-GAAP financial measure that was included in a communication filed  
under one of those rules is also disclosed in a Securities Act registration  
statement, proxy statement, or tender offer statement, this exemption from  
Regulation G and Item 10(e) of Regulation S-K would not be available for that  
non-GAAP financial measure.

17 *Id.*

18 31. Thus, the C&DI makes clear that the so-called "business combination" exemption

19 <sup>1</sup> Mary Jo White, *Keynote Address, International Corporate Governance Network Annual*  
20 *Conference: Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-*  
21 *GAAP, and Sustainability* (June 27, 2016), [https://www.sec.gov/news/speech/chair-white-icgn-](https://www.sec.gov/news/speech/chair-white-icgn-speech.html)  
[speech.html](https://www.sec.gov/news/speech/chair-white-icgn-speech.html) (last visited June 11, 2019) (emphasis added).

22 <sup>2</sup> See, e.g., Nicolas Grabar and Sandra Flow, *Non-GAAP Financial Measures: The SEC's*  
23 *Evolving Views*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL  
24 REGULATION (June 24, 2016), [https://corpgov.law.harvard.edu/2016/06/24/non-gaap-financial-](https://corpgov.law.harvard.edu/2016/06/24/non-gaap-financial-measures-the-secs-evolving-views/)  
25 [measures-the-secs-evolving-views/](https://corpgov.law.harvard.edu/2016/06/24/non-gaap-financial-measures-the-secs-evolving-views/) (last visited June 11, 2019); Gretchen Morgenson, *Fantasy*  
26 *Math Is Helping Companies Spin Losses Into Profits*, N.Y. TIMES, Apr. 22, 2016,  
[http://www.nytimes.com/2016/04/24/business/fantasy-math-is-helping-companies-spin-losses-](http://www.nytimes.com/2016/04/24/business/fantasy-math-is-helping-companies-spin-losses-into-profits.html?_r=0)  
[into-profits.html?\\_r=0](http://www.nytimes.com/2016/04/24/business/fantasy-math-is-helping-companies-spin-losses-into-profits.html?_r=0) (last visited June 11, 2019).

27 <sup>3</sup> *Non-GAAP Financial Measures*, U.S. SECURITIES AND EXCHANGE COMMISSION (Apr. 4,  
28 2018), <https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm#101> (last visited June  
11, 2019). To be sure, there are other situations where Regulation G would not apply but are not  
applicable here.



1 from the Regulation G non-GAAP to GAAP reconciliation requirement applies solely to the  
 2 extent that a third-party, such as a financial advisor, has utilized projected non-GAAP financial  
 3 measures to render a report or opinion to the Board. To the extent the Board also examined and  
 4 relied on internal financial forecasts to recommend a transaction, Regulation G applies.

5 32. Thus, to bring the Proxy into compliance with Regulation G as well as cure the  
 6 materially misleading nature of the forecasts under SEC Rule 14a-9 as a result of the omitted  
 7 information, Defendants must provide a reconciliation table of the non-GAAP measures to the  
 8 most comparable GAAP measures.

9 ***Financial Analyses***

10 33. With respect to Cowen's *Analysis of Selected Publicly Traded Companies*, the  
 11 Proxy fails to disclose the individual multiples and metrics for the companies selected by Cowen.

12 34. With respect to Cowen's *Analysis of Selected Transactions*, the Proxy fails to  
 13 disclose the individual multiples and metrics for the companies selected by Cowen.

14 35. With respect to Cowen's *Discounted Cash Flow Analysis*, the Proxy fails to  
 15 disclose: (i) the line items used to calculate the Company's unlevered free cash flows utilized by  
 16 Cowen; (ii) Intermolecular's projected unlevered free cash flow for the six-month period ending  
 17 December 31, 2019 through fiscal year ending 2013; (iii) the basis for Cowen's selection of the  
 18 range of discount rates of 16.5% to 18.5% including the assumptions for calculating the  
 19 Company's weighted average cost of capital; (iii) the basis for Cowen's selection of range of  
 20 perpetuity growth rates of 8.3% to 12.8%; (iv) the basis for selecting terminal multiples of  
 21 Adjusted EBITDA ranging from 4.0x to 6.0x; and (v) Intermolecular's estimated net operating  
 22 loss carry forwards used by Cowen.

23 36. In sum, the Proxy independently violates both: (i) Regulation G, which requires a  
 24 presentation and reconciliation of any non-GAAP financial measure to their most directly  
 25 comparable GAAP equivalent; and (ii) Rule 14a-9, since the material omitted information renders  
 26 certain statements, discussed above, materially incomplete and misleading. As the Proxy  
 27 independently contravenes the SEC rules and regulations, Defendants violated Section 14(a) and  
 28 Section 20(a) of the Exchange Act by filing the Proxy to garner votes in support of the Proposed

Transaction from Intermolecular shareholders.

37. Absent disclosure of the foregoing material information prior to the special shareholder meeting to vote on the Proposed Transaction, Plaintiff will not be able to make a fully informed decision regarding whether to vote in favor of the Proposed Transaction, and she is thus threatened with irreparable harm, warranting the injunctive relief sought herein.

### **FIRST CAUSE OF ACTION**

#### **(Against All Defendants for Violations of Section 14(a) of the Exchange Act and 17 C.F.R. § 244.100 Promulgated Thereunder)**

38. Plaintiff repeats and re-alleges each allegation set forth above as if fully set forth herein.

39. Section 14(a)(1) of the Exchange Act makes it “unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78l of this title.” 15 U.S.C. § 78n(a)(1).

40. As set forth above, the Proxy omits information required by SEC Regulation G, 17 C.F.R. § 244.100, which independently violates Section 14(a). SEC Regulation G among other things, requires an issuer that chooses to disclose a non-GAAP measure to provide a presentation of the “most directly comparable” GAAP measure, and a reconciliation “by schedule or other clearly understandable method” of the non-GAAP measure to the “most directly comparable” GAAP measure. 17 C.F.R. § 244.100(a).

41. The failure to reconcile the numerous non-GAAP financial measures included in the Proxy violates Regulation G and constitutes a violation of Section 14(a).

### **SECOND CAUSE OF ACTION**

#### **(Against All Defendants for Violations of Section 14(a) of the Exchange Act and Rule 14a-9 Promulgated Thereunder)**

42. Plaintiff repeats and re-alleges each allegation set forth above as if fully set forth

1 herein.

2 43. SEC Rule 14a-9 prohibits the solicitation of shareholder votes in registration  
3 statements that contain “any statement which, at the time and in the light of the circumstances  
4 under which it is made, is false or misleading with respect to any material fact, or which omits to  
5 state any material fact necessary in order to make the statements therein not false or misleading.”  
6 17 C.F.R. § 240.14a-9.

7 44. Regulation G similarly prohibits the solicitation of shareholder votes by  
8 “mak[ing] public a non-GAAP financial measure that, taken together with the information  
9 accompanying that measure . . . contains an untrue statement of a material fact or omits to state a  
10 material fact necessary in order to make the presentation of the non-GAAP financial measure . . .  
11 not misleading.” 17 C.F.R. § 244.100(b).

12 45. Defendants have issued the Proxy with the intention of soliciting shareholder  
13 support for the Proposed Transaction. Each of the Defendants reviewed and authorized the  
14 dissemination of the Proxy, which fails to provide critical information regarding, amongst other  
15 things, the financial forecasts for the Company.

16 46. In so doing, Defendants made untrue statements of fact and/or omitted material  
17 facts necessary to make the statements made not misleading. Each of the Individual Defendants,  
18 by virtue of their roles as officers and/or directors, were aware of the omitted information but  
19 failed to disclose such information, in violation of Section 14(a). The Individual Defendants were  
20 therefore negligent, as they had reasonable grounds to believe material facts existed that were  
21 misstated or omitted from the Proxy, but nonetheless failed to obtain and disclose such  
22 information to shareholders although they could have done so without extraordinary effort.

23 47. The Individual Defendants knew or were negligent in not knowing that the Proxy  
24 is materially misleading and omits material facts that are necessary to render it not misleading.  
25 The Individual Defendants undoubtedly reviewed and relied upon the omitted information  
26 identified above in connection with their decision to approve and recommend the Proposed  
27 Transaction.

28 48. The Individual Defendants knew or were negligent in not knowing that the

1 material information identified above has been omitted from the Proxy, rendering the sections of  
 2 the Proxy identified above to be materially incomplete and misleading.

3 49. The Individual Defendants were, at the very least, negligent in preparing and  
 4 reviewing the Proxy. The preparation of a registration statement by corporate insiders containing  
 5 materially false or misleading statements or omitting a material fact constitutes negligence. The  
 6 Individual Defendants were negligent in choosing to omit material information from the Proxy or  
 7 failing to notice the material omissions in the Proxy upon reviewing it, which they were required  
 8 to do carefully as the Company's directors. Indeed, the Individual Defendants were intricately  
 9 involved in the process leading up to the signing of the Merger Agreement and the preparation of  
 10 the Company's financial forecasts.

11 50. Intermolecular is also deemed negligent as a result of the Individual Defendants'  
 12 negligence in preparing and reviewing the Proxy.

13 51. The misrepresentations and omissions in the Proxy are material to Plaintiff, who  
 14 will be deprived of her right to cast an informed vote if such misrepresentations and omissions are  
 15 not corrected prior to the vote on the Proposed Transaction.

16 52. Plaintiff has no adequate remedy at law. Only through the exercise of this Court's  
 17 equitable powers can Plaintiff be fully protected from the immediate and irreparable injury that  
 18 Defendants' actions threaten to inflict.

19 **THIRD CAUSE OF ACTION**  
 20 **(Against The Individual Defendants for**  
 21 **Violations of Section 20(a) of the Exchange Act)**

22 53. Plaintiff incorporates each and every allegation set forth above as if fully set forth  
 23 herein.

24 54. The Individual Defendants acted as controlling persons of Intermolecular within  
 25 the meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their positions  
 26 as officers and/or directors of Intermolecular, and participation in and/or awareness of the  
 27 Company's operations and/or intimate knowledge of the incomplete and misleading statements  
 28 contained in the Proxy filed with the SEC, they had the power to influence and control and did  
 influence and control, directly or indirectly, the decision making of the Company, including the

1 content and dissemination of the various statements that Plaintiff contends are materially  
2 incomplete and misleading.

3         55. Each of the Individual Defendants was provided with or had unlimited access to  
4 copies of the Proxy and other statements alleged by Plaintiff to be misleading prior to and/or  
5 shortly after these statements were issued and had the ability to prevent the issuance of the  
6 statements or cause the statements to be corrected.

7         56. In particular, each of the Individual Defendants had direct and supervisory  
8 involvement in the day-to-day operations of the Company, and, therefore, is presumed to have  
9 had the power to control or influence the particular transactions giving rise to the Exchange Act  
10 violations alleged herein, and exercised the same. The Proxy at issue contains the unanimous  
11 recommendation of each of the Individual Defendants to approve the Proposed Transaction. They  
12 were thus directly involved in preparing the Proxy.

13         57. In addition, as the Proxy sets forth at length, and as described herein, the  
14 Individual Defendants were involved in negotiating, reviewing, and approving the Merger  
15 Agreement. The Proxy purports to describe the various issues and information that the Individual  
16 Defendants reviewed and considered. The Individual Defendants participated in drafting and/or  
17 gave their input on the content of those descriptions.

18         58. By virtue of the foregoing, the Individual Defendants have violated Section 20(a)  
19 of the Exchange Act.

20         59. As set forth above, the Individual Defendants had the ability to exercise control  
21 over and did control a person or persons who have each violated Section 14(a) and Rule 14a-9 by  
22 their acts and omissions as alleged herein. By virtue of their positions as controlling persons,  
23 these Defendants are liable pursuant to Section 20(a) of the Exchange Act. As a direct and  
24 proximate result of Individual Defendants' conduct, Plaintiff will be irreparably harmed.

25         60. Plaintiff has no adequate remedy at law. Only through the exercise of this Court's  
26 equitable powers can Plaintiff be fully protected from the immediate and irreparable injury that  
27 Defendants' actions threaten to inflict.  
28

**RELIEF REQUESTED**

**WHEREFORE**, Plaintiff demands judgment against Defendants as follows:

A. Preliminarily and permanently enjoining Defendants and their counsel, agents, employees and all persons acting under, in concert with, or for them, from proceeding with, consummating, or closing the Proposed Transaction, unless and until the Company discloses the material information discussed above which has been omitted from the Proxy;

B. In the event that the proposed transaction is consummated, rescinding it and setting it aside, or awarding rescissory damages;

C. Awarding compensatory damages against Defendants, individually and severally, in an amount to be determined at trial, together with pre-judgment and post-judgment interest at the maximum rate allowable by law, arising from the Proposed Transaction;

D. Awarding Plaintiff the costs and disbursements of this action and reasonable allowances for fees and expenses of Plaintiff's counsel and experts; and

E. Granting Plaintiff such other and further relief as the Court may deem just and proper.

**DEMAND FOR JURY TRIAL**

Plaintiff hereby demands a trial by jury.

DATED: June 11, 2019

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